IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 321.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., AND CHARLES H. BROMANN,
Petitioners,

vs.

JEWEL TEA COMPANY, INC.,
Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI.

The Petition of Associated Food Retailers and Bromann is companion to the Petition of the unions in No. 240. The Brief in Opposition in No. 240 sets forth the basic reasons why both Petitions should be denied.

The Petition in this docket is based upon fundamental factual and legal misapprehensions:

The District Court's action in dismissing Associated and Bromann at the close of the plaintiff's evidence because, in the District Court's eye, there was no evidence of "conspiracy," was consistent only with the view by the District Court that a contract in open restraint of trade is not a "conspiracy" within the meaning of the Sherman Act, that there must be proof of some concealed or secret

evil doing; that a "contract" openly in restraint of trade, absent an independent and separate "conspiracy," is not vulnerable to the Sherman Act. However, the Sherman Act condemns "every contract, combination * * *, or conspiracy, in restraint of trade * * *." The complaint (App. 14) alleged each of those terms and incorporated copies of the accused contracts as exhibits, the negotiation of which was admitted by petitioners' answer. As the Court of Appeals points out (Pet. p. 11a), under the circumstances of this case whether the illegal compact be called an "agreement," a "contract," or a "conspiracy," is immaterial. By hornbook definition, a conspiracy may consist in the use of lawful means (a contract) to accomplish an unlawful end (restraint of trade), or unlawful means to accomplish a lawful end. Here there was an open contract to restrain trade which the District Court characterized as follows:

> "From 1957 plaintiff sought exclusion of the restriction on night sales from the industry-wide contract and defendant local unions resisted such exclusion. The rest of the industry agreed with the defendant local unions to continue the ban on night operations." (App. 658.)

The case presents no question of preserving multi-employer bargaining. The opinion in no way condemns such bargaining. The restraint was held illegal by the Court of Appeals not because of form but because of substance, *i.e.*, it was an unreasonable restraint upon unimpeded competition. The opinion will no more interfere with multi-employer bargaining upon legitimate subjects than has *Allen-Bradley Co. v. Local Union No. 3*, 325 U. S. 797 (1945).

The fact that the contracts contain a clause as to partial invalidity will not save them, for that clause becomes effective only when "a court or board of competent jurisdic-

tion" holds a clause violative of law (App. 32, 46). Hence, this action. Meantime, the restraint remains in force.

While it may be true that Associated and Bromann, as this litigation has progressed (and perhaps because of it), have softened their opposition to night operations, that does not change the undisputed record that in 1957 they opposed night operations and insisted that the two-year contract then being negotiated contain the complete restraint for one more year and, at best, be modified for the second year to continue the restraint as to every evening of the week except one, and upon condition that a butcher be kept on duty (App. 396).* If Associated and Bromann can prove, as they now allege, that at some time after 1959 they ceased being willing members of the combination, that fact undoubtedly will be taken into account by the District Court in determining appropriate relief.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 19, 1964.

*The statement of the District Court quoted in the Petition (p. 10) that Associated joined in an all-employer offer demanding total "elimination" of the restriction is flatly contrary to the undisputed evidence.